

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| Exclusive Service Contracts for Provision |) | MB Docket No. 07-51 |
| of Video Services in Multiple Dwelling |) | (NPRM FCC 07-32) |
| Units and Other Real Estate Developments |) | |

COMMENTS OF THE NEW JERSEY
DIVISION OF RATE COUNSEL

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I. INTRODUCTION

On March 22, 2007 (released March 27, 2007), the Federal Communications Commission (“FCC”) adopted a Notice of Proposed Rulemaking (“NPRM”) (MB Docket No. 07-51), soliciting comments on the use of exclusive contracts for the provision of video services to multiple dwelling units (“MDUs”) or other real estate developments. The FCC also solicited comments on whether it had the authority to regulate such exclusive contracts.

In the NPRM, the FCC states that “[g]reater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy.”¹ The NPRM references comments by potential entrants that claim that the use of exclusive contracts for the provision of video services to MDUs or other real estate developments serves as a barrier to entry. As a result, the FCC issued the NPRM to determine if the use of exclusive contracts “unreasonably impedes the achievement of the interrelated federal goals of enhanced multichannel video competition and accelerated broadband deployment, and if so, how the FCC should act to address that problem.”²

The New Jersey Division of Rate Counsel (“Rate Counsel”) welcomes the opportunity to submit these comments in response to the NPRM.

II. INTEREST OF THE DIVISION OF RATE COUNSEL IN THE INSTANT PROCEEDING

The Division of Rate Counsel is a division within the Department of the Public Advocate.³ Rate Counsel is committed to fostering an environment that will benefit all

¹ NPRM, paragraph 1.

² Id.

³ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The

cable customers through the development of a robust and competitive cable market. Such a market will provide customers with the greatest number of choices at the lowest rates. However, Rate Counsel is also mindful of the important responsibilities granted to the local franchising authorities (“LFAs”) by federal legislation. The LFAs role is to balance the goal of a vibrant and competitive cable market with the need for proper oversight over entities that are granted the right to offer service in their franchise areas. Rate Counsel believes that this balance is important. Moreover, this balance is already provided for in current federal and state laws. In the State of New Jersey, the New Jersey Board of Public Utilities (“Board”) is the LFA.

III. BACKGROUND

In 1997, the FCC issued a NPRM regarding the use of exclusive access arrangements in MDUs. At that time, the FCC stated that exclusive service contracts between MDU owners and multichannel video programming distributors (“MVPDs”) could be considered anti-competitive or pro-competitive, depending upon the

Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman’s Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq.. The mission of the Ratepayer Advocate was to make sure that all classes of utility customers received safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A. 52:27EE-1 et seq.*). The Department is authorized by statute to “represent the public interest in such administrative and court proceedings...as the Public Advocate deems shall best serve the public interest,” *N.J.S.A. 52:27EE-57*, i.e., an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or this State inhering in the citizens of this State or in a broad class of such citizens.” *N.J.S.A.52:27EE-12*. The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

circumstances. While such exclusive contracts prevent other service providers from entering into a specific facility, the existence of such contracts makes it easier for providers that have entered into such contracts to recover their investment, thereby providing an incentive for additional investment. As a result of the NPRM issued in 1997, the FCC declined to take any action on this issue.

The FCC notes that the video provider market is currently undergoing a change, with the entrance of traditional phone companies that are primed to offer a triple play of voice, high-speed Internet access, and video services over their respective networks.⁴ Accordingly, the FCC is seeking comment on a variety of issues relating to the use of exclusive contracts for video services. Specifically, the NPRM seeks comments on the following:

- The current environment for MVPDs attempting to obtain access to MDUs or other real estate developments, including:
 1. To what extent do exclusive contracts impede the realization of the FCC's policy goals?
 2. How often have competitive entrants confronted exclusive access arrangements, what are the terms of those arrangements, and are these agreements becoming more prevalent?
 3. How has the multichannel video marketplace changed since adoption of the *Inside Wiring Report and Order*, and what effect have those changes had for consumers who live in MDUs or other real estate developments?
 4. What is the current status of state mandatory access laws and what impact do they have on the issues raised herein?
- Additional information on the MVPDs operating pursuant to exclusive contracts, including:
 1. Whether MVPDs seek exclusive contracts in an effort to frustrate competitive entry.
 2. If incumbent providers use the time during which new entrants are negotiating local franchises in order to obtain exclusive contracts.

⁴ NPRM, paragraph 6.

3. Whether, in today's market, exclusive contracts benefit new entrants, incumbent providers, or both.
4. Whether the video providers entering into such exclusive contracts would be unable to provide service to these MDUs or other real estate developments absent the protections afforded by exclusive contracts.

In the NPRM, the FCC tentatively concluded that it has authority to regulate exclusive contracts for the provision of video services to MDUs or other real estate developments where the FCC finds that such contracts may impede competition and impair deployment of these services. The FCC seeks comment on this tentative conclusion. In addition, the FCC asks the parties to comment on the scope of any such FCC authority, including:

- Whether the FCC has authority to regulate only exclusive contracts entered into after the effective date of the regulations or could it declare existing exclusive contracts void or voidable?
- Does the FCC have authority to regulate exclusive contracts entered into by the MVPDs other than cable operators?
- What effect, if any, do state mandatory access laws or other statutory or constitutional considerations have on the FCC's authority in this area?

The FCC also seeks comments on whether FCC action is needed to ensure competitive video access to MDUs. The FCC seeks comments on the impact of exclusive contracts on consumer choice and video competition, including:

- Does the existence of exclusive contracts within a community reduce the likelihood of competitive entry in the community?
- What are the typical durations of existing contracts?
- Are the costs associated with providing service to MDUs or other real estate developments significantly more than the costs of providing service in other areas?
- Is there more risk associated with serving these types of developments?
- Are the marketing costs higher in these areas?
- Is customer churn higher?
- How do the prices and services offered under the exclusive contracts compare to those offered to other customers?
- Are additional payments made to or by the MVPD in return for exclusive contracts?

- Do existing exclusive contracts provide the MVPD with a right of first refusal when renegotiating the contracts?
- Should the FCC limit exclusive contracts only where the video provider at issue possesses market power?
- Does the competitive impact of exclusive contracts differ depending on whether a competing terrestrial MVPD was able to provide service to the MDU or other real estate development at the time the exclusive contract was negotiated?

The FCC also seeks comments on the use of perpetual contracts, including whether such contracts are being used. The FCC seeks comments as to whether perpetual contracts are anti-competitive or if there are instances where such contracts do not impede the FCC's policy goals. Finally, the FCC seeks comments on whether there are specific rules or guidance that it should adopt to ensure that exclusive contracts do not unreasonably impede competitive entry. While Rate Counsel believes these are important issues, the FCC is not the forum in which these issues should be addressed.

IV. THE FCC DOES NOT HAVE AUTHORITY TO REGULATE THE USE OF EXCLUSIVE CONTRACTS.

Rate Counsel respectfully submits that the FCC lacks the authority to exercise jurisdiction over exclusive contracts for MDUs, absent specific Congressional authorization to do so. Title VI of the Act is clear that Congress's intent was that the franchise process takes place at the local level so that local franchise authorities can require cable operators to tailor the cable system to meet local needs.⁵ Absent Congressional direction, the FCC cannot usurp the authority of local franchise authorities to address such local issues. Any attempt by the FCC to extend its authority to the regulation of exclusive contracts for MDUs would be a direct violation of the current statutes and would implicate substantial constitutional and preemption concerns. As

⁵ H.R. Rep. No. 934, 98th Congress, 2d Sess. at 24, *reprinted in* 1984 U.S.C.C.A.N. 4655 ("1984 House Report")

noted by the FCC, the existence of exclusive contracts may be anti-competitive, or they may be pro-competitive in that they reduce uncertainty surrounding recovery of investment by video providers. The States and their local franchise authorities, and not the FCC, are in the best position to evaluate the impact of exclusive contracts on the local competitive landscape and to take whatever action the local franchise authority deems appropriate.

The fact is that Title VI of the Act provides no basis for the FCC to embark on a regime that would preempt and force local authorities to abide by directives of the FCC in this area.

As Commissioner Adelstein noted in his dissenting opinion in the 621 Order, “...the FCC is a regulatory agency, not a legislative body.”⁶ In this NPRM, the FCC is attempting to legislate about matters that touch and concern purely local issues to enforce its view on the benefits or harms associated with exclusive contracts. However, the authority for addressing exclusive contracts clearly lies with state legislatures and/or local franchise authorities, and not with the FCC. The FCC’s stated intention raises substantial constitutional concerns, including 10th Amendment and 11th Amendment issues, as well as preemption issues. In view of the foregoing, Rate Counsel submits there is no need to address the other issues raised by the FCC in the NPRM.

⁶ *I/M/O Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, released March 5, 2007 (“621 Order”).

V. THE STATE OF NEW JERSEY HAS ALREADY EXAMINED ISSUES RELATING TO EXCLUSIVE CONTRACTS

Consistent with its authority under Federal law, the State of New Jersey has already addressed the issue of exclusive contracts for video services. In 1983, the New Jersey legislature adopted a law banning exclusive contracts. Specifically, the law, as codified, provides in pertinent part:

a. No owner of any dwelling or his agent shall forbid or prevent any tenant of such dwelling from receiving cable television service, nor demand or accept payment in any form as a condition of permitting the installation of such service in the dwelling or portion thereof occupied by such tenant as his place of residence, nor shall discriminate in rental charges or otherwise against any such tenant receiving cable television service; provided, however, that such owner or his agent may require that the installation of cable television facilities conforms to all reasonable conditions necessary to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants; and further provided, that a cable television company installing any such facilities for the benefit of a tenant in any dwelling shall agree to indemnify the owner thereof for any damage caused by the installation, operation or removal of such facilities and for any liability which may arise out of such installation, operation or removal.⁷

Clearly, the State of New Jersey intended to promote competition of the cable marketplace by precluding exclusive contracts. Such matters should be left to individual states to decide, absent Congressional direction to the contrary.

The prohibition on exclusive contracts in New Jersey encourages lower prices and technological development and deployment, and provides consumers with a greater number of alternatives. However, other States may reach different conclusions consistent with the roles assigned to the Federal Government and States under the Constitution. In view of the foregoing, Rate Counsel sees no basis under which the FCC can proceed to regulate exclusive contracts at the local level.

⁷ N.J.S.A. 48:5A-49(a).

VI. CONCLUSION

In conclusion, the Rate Counsel respectfully submits that the issues outlined in the NPRM go beyond the legal authority of the FCC and the FCC should close the proceeding.

Respectfully submitted,

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